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Supreme Court, U.S.
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No. 98-46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Petitioner,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *et al.*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ATCHISON, TOPEKA & SANTA FE RAILWAY, *et al.*

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August 3, 1998

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QUESTION PRESENTED

Whether the language of the particular collective bargaining agreement provision in this case is so clear that a court is precluded from considering the provision's bargaining history in order to determine whether the railroads' contractual interpretation is "frivolous or obviously insubstantial," or is "arguably justified" and thus subject to mandatory arbitration under § 3 of the Railway Labor Act.[1]

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[1] Rule 15.2 of the Rules of this Court requires respondents to advise the Court if in their view the question presented by petitioner is not presented on the record below. The question tendered by petitioner -- whether a dispute can be a minor dispute when the railroads' contract interpretation is "not arguably justified" by the terms of the agreement, is "refuted" by its "plain language," and "is predicated solely on evidence external to the agreement" -- is not presented by the decision below. As we show herein, both the majority and the dissent in the court below agreed that extrinsic evidence cannot be used to contradict the plain terms of a written agreement, but they disagreed as to whether the particular contract in dispute in this case was sufficiently plain to preclude consideration of the evidence in question. Thus, the case does not present the broad issue stated by petitioner but instead presents only a question as to the application of unchallenged legal principles to particular facts.

LIST OF PARTIES AND RULE 29 LIST

The parties to this proceeding are the petitioner Brotherhood of Maintenance of Way Employes and the following respondents[2] (with parent companies and nonwholly owned subsidiaries):

1. Atchison, Topeka & Santa Fe Railway

   Burlington Northern Santa Fe Railway Company

2. Burlington Northern Railroad

   Burlington Northern Santa Fe Railway Company

3. Consolidated Rail Corporation

   Conrail, Inc.

4. Norfolk Southern Railway Company

   Norfolk Railway Corporation

5. Norfolk and Western Railway Company

   Norfolk Railway Corporation

6. Union Pacific Railroad Company

   Union Pacific Corporation

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[2] CSX Transportation, Inc., which was an additional party to this action, was dismissed by an order of the Seventh Circuit Court of Appeals dated January 9, 1998, in response to the parties' joint Agreement for Voluntary Dismissal of Appeal as to Appellant CSX Transportation, Inc. Only.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Petitioner,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN RAILROAD, CONSOLIDATED RAIL CORPORATION, NORFOLK SOUTHERN RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, AND UNION PACIFIC RAILROAD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

The case involves Sections 2 Seventh, 3, and 6 of the Railway Labor Act, 45 U.S.C. §§ 152 Seventh, 153, and 156, set forth in Appendix D to the Petition.

STATEMENT OF THE CASE

The ultimate issue in this case is whether a dispute between the petitioner union ("BMWE") and the respondent railroads ("railroads") is a minor or a major dispute under the Railway Labor Act ("RLA") -- *i.e.*, whether it should be resolved through mandatory arbitration under § 3 of the RLA or whether instead the union may enforce its position by strikes or injunction. Both the majority and dissenting members of the court below agreed

that the governing test under *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 307 (1989) ("Conrail"), is whether the railroads' interpretation of the collective bargaining agreement is "arguably justified by the terms of the parties' agreement," in which case the dispute is minor and must be arbitrated, or, instead, is "frivolous or obviously insubstantial," in which case the dispute is a major dispute that can give rise to strikes. (Pet. App. 5a, 15a.) The majority and the dissent disagreed, however, about the application of that standard to the specific facts of this case.

The dispute concerns the term "employees" as used in Article XIV of the parties' September 1996 national agreement. Article XIV establishes an entirely new travel allowance for certain maintenance of way employees. The travel allowance provision was not drafted by the parties themselves. It was taken virtually without change from a recommendation in the report of Presidential Emergency Board No. 229 ("PEB 229"), appointed under § 10 of the RLA (45 U.S.C. § 160) to make recommendations for settlement of disputes arising from contract demands in notices exchanged by the parties in 1994 under § 6 of the RLA (45 U.S.C. § 156). (Pet. App. 5a.) The PEB report cautioned that the Board did "not intend[] to write the precise language of the collective bargaining agreement" and that the parties "must work through the ambiguities that inevitably appear in a document dealing with so many complex issues presented in such a short period of time." (J.A. 403).[3] However, the parties, confronted with the 30-day deadline prescribed by § 10, "could not agree on implementing language" for the travel allowance recommendation (as well as several other recommendations), so "[t]hey chose instead to copy verbatim the pertinent recommendation of PEB 229." (Pet. App. 5a.) They thereby "averted a strike" over disputes about the interpretation and application of the recommendations, leaving such disputes for later resolution under the RLA. (Id.; J.A. 117-18).

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[3] The Joint Appendix in the court below is cited as "J.A." herein.

In consequence, the provision in Article XIV in dispute, which the union calls "definitional,"[4] reads like a summary of issues addressed, not a contract. It states:

> "At the beginning of the work season *employees* are required to travel from their homes to the initial reporting location, and at the end of the season they will return home. This location could be hundreds of miles from their residences. During the work season the Carriers' service may place them hundreds of miles away from home at the end of each work week. Accordingly, the Carriers will pay to each *employee* a minimum travel allowance as follows for all miles actually traveled by the most direct highway route for each round trip" (Pet. App. 19a, 6a) (emphasis added).

The provision then sets forth a schedule of payments for distances traveled and an air travel option, without further definition of the "employees" covered by the provision. (Pet. App. 24a-25a.)

Notwithstanding the imprecision of the travel allowance recommendation itself, the PEB clearly identified the underlying union concerns that it was addressing with this recommendation, stating that the union contended that maintenance of way employees "subsidize the Carriers' *regional and system gangs* with staggering amounts of unpaid travel time and unreimbursed automobile expense for travel between their homes and distant work locations." (Pet. App. 11a-13a; J.A. 369) (emphasis added). This distillation of the union's bargaining position was based on the union's own submissions and testimony to the PEB. As the court below noted, in several instances the union itself linked the issue of travel allowances to regional and system

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[4] Brief of BMWE to the Seventh Circuit at 11 (Feb. 12, 1997).

gangs. (Pet. App. 12a.) The union's witness on travel allowances explained the "fundamental purpose" and "goal" of the union's travel allowance demands, stating:

> "Here is what we are after, here is what [the BMWE] wants out of this [travel allowance] proposal": "We believe maintenance-of-way employees should not be required to subsidize the carriers' most productive gangs, its *regional and system gangs*, by traveling long hours without pay or travel expense to work on the gangs." (Pet. App. 12a-13a) (emphasis added).

This dispute over Article XIV arose when the railroads began to implement the parties' new agreement. As the court below observed, Article XIV does not "define[] which employees are to be covered" (Pet. App. 6a). Neither side claims that the term "employees" in the agreement should be literally applied to cover *all* employees who travel to work, including those who must commute to their work sites at the beginning of each week and those who travel daily from a central reporting point to various locations on the railroad. Rather, the union claims that the agreement applies to a smaller subset -- so-called "traveling employees" who have no fixed "headquarters" at which they report throughout the year. The railroads claim that the term applies to an even smaller subset -- members of seasonal gangs (often called regional and system gangs) whose work often takes them hundreds of miles from home across seniority district lines. As both sides acknowledge, however, the agreement itself does not explicitly limit its application either to traveling employees without a "fixed headquarters," as the union contends, or to "regional and system gang" members, as the railroads claim.

The railroads believe that the PEB took the union at its word, recommending a settlement that provided a new travel allowance for regional and system gang members. The union claims, on the other hand, that the PEB gave it what it had demanded in its initial Section 6 notice, rather than the more limited allowance

it told the PEB "is what we are after."[5] It sued the railroads in the Central District of Illinois for an injunction against the railroads' alleged violation of the "plain" terms of Article XIV and called a surprise strike against two of the respondents, which was temporarily restrained pending decision. (Pet. App. 3a; J.A. 27.)

The district court agreed with the union that Article XIV plainly covers all "travelling employees" without "fixed headquarters," despite the fact that the agreement does not contain this phrase.[6] (Pet. App. 30a.) It therefore refused to consider the PEB hearings and report (Pet. App. 30a-31a) and granted the union's request for an injunction against the railroads' alleged violation, denying the railroads' request for an injunction against strikes. It enjoined strikes pending appeal, however. (Pet. App. 35a-36a.)

On appeal, a divided panel of the court of appeals reversed. The majority and the dissent did not disagree about the governing legal principles. The dissent agreed with the majority that the ultimate question is governed by the standard settled by *Conrail*, that a "dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement" and "is major only where 'the employer's claims are frivolous or obviously insubstantial.'" (Pet. App. 15a, 5a.) The majority agreed with the dissent that "extrinsic evidence cannot be used

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[5] While neither side formally withdrew its opening demands with respect to this or many other issues, the PEB, whose job was to fashion a settlement, sought to have them identify their real goals in an effort to narrow the issues in dispute. (J.A. 361-64.)

[6] The district court unaccountably stated at one point in its opinion that "the Carriers appear to concede that the plain language of Article XIV of the CBA unambiguously applies to all travelling employees." (Pet. App. 28a.) Although petitioner stresses that statement in its petition, no such concession appears anywhere in the record. To the contrary, the railroads consistently argued that the PEB language best describes regional and system gangs. (J.A. 106-07.) At most, the railroads conceded that the language is ambiguous. Id.

to override the 'express provisions of a written contract'" and that the "RLA does not free either party from the consequences of agreeing to a text." (Pet. App. 8a-9a, 17a.)

They disagreed, however, about the application of those principles to the particular agreement provision in issue here. The majority concluded that the undefined term "employees" in the agreement was not so definitive that it was "frivolous" for the railroads to rely on the PEB hearings and report to show a latent ambiguity as to which employees were covered. (Pet. App. 6a, 13a-14a.) The dissent believed that the terms of the agreement were so "absolutely unambiguous" that resort to extrinsic evidence would contradict the plain meaning of this particular contract provision. (Pet. App. 16a, 20a.)

The entire court of appeals then denied a suggestion for rehearing *en banc*. On consideration of the suggestion, however, the panel modified a footnote in the original opinion, to make clear, if it was not already clear, that the panel majority did not disagree with the principle relied on by the dissent, but only with its application here, confirming that in the majority's view "the term 'employee' in Article XIV" was sufficiently "ambiguous" to allow consideration of the extrinsic evidence relied on by the railroads in determining whether the railroads' interpretation of the agreement was arguably justified by the agreement and thus subject to mandatory arbitration.[7] (Compare Pet. App. 9a. n.1 with Pet. App. 39a-40a.)

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[7] On May 19, 1998, following issuance of the court of appeals' mandate, the district court entered an injunction against strikes over the parties' dispute and dismissed the union's claims.

REASONS FOR DENYING THE WRIT

The decision below does not raise any important issue of federal law that has not already been settled by this Court, nor does it conflict with decisions of this Court or any other court. Rather, it turns on the application of well-established principles to particular facts. Accordingly, the petition for certiorari should be denied.

I. THE DECISION OF THE PANEL DOES NOT CONFLICT WITH THIS COURT'S *CONRAIL* DECISION

The union's principal argument in its petition is one that it pursued unsuccessfully in the court of appeals below -- that the *Conrail* test incorporates an implicit "parol evidence" rule because it requires that a carrier's interpretation be arguably justified "by the terms of the parties' agreement." (Pet. at 10-11.) In other words, the union argues that courts are restricted to the language of the agreement alone when determining whether the carrier's position is "frivolous" or not.

This contention was not accepted by either the majority or the dissent in the court below, as it is obviously incorrect. The particular phrasing of the major-minor test on which the union relies is merely one of the many ways this Court described that test in *Conrail*. For example, it also stated that the question is whether the carrier's interpretation is "frivolous or obviously insubstantial." 491 U.S. at 307, 312. Elsewhere, the Court examined whether the carrier's interpretation is "arguable." *Id.* at 319. None of these other phrasings incorporates the words "by the terms of the agreement." Thus, it is inappropriate to accord

any special meaning or significance to the particular phrasing emphasized by the union.[8]

Moreover, the issue of when extrinsic evidence may be considered to interpret a written bargaining agreement was not even presented in *Conrail*, which did not involve the interpretation of a written provision. But to the extent that the *Conrail* decision gave any hint about the appropriateness of references to extrinsic evidence in this context, it indicates that such evidence may be considered. The collective bargaining agreement in that case was silent as to the matter in dispute, and so the question turned on the carrier's reliance on implied terms. The *Conrail* Court therefore looked to extrinsic evidence in the form of "past practice, custom, and usage" to interpret the agreement -- a fact that simply cannot be squared with the union's "parol evidence" theory. *Id.* at 318, 319.

No court of appeals has ever adopted the BMWE's "implicit parole evidence rule" interpretation of the *Conrail* decision. To the contrary, every court of appeals that has considered the use of extrinsic evidence in this context has ruled that such evidence may be used to demonstrate that a railroad's contractual position is "arguably justified." *See SEPTA* v. *Brotherhood of R.R. Signalmen*, 882 F.2d 778, 785 (3d Cir. 1989) (holding that "it was proper for the district court to use parol evidence" in making RLA major/minor dispute determination despite apparent conflict with the language of the agreement); *United Transp. Union* v. *South Carolina Pub. Ry. Comm'n*, 130 F.3d

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[8] The *Conrail* decision notes that "[v]erbal formulations of [the major-minor] standard have differed over time and among the Circuits: phrases such as 'not arguably justified,' 'obviously insubstantial,' 'spurious,' and 'frivolous' have been employed. 'These locutions are essentially the same in their result. They illustrate the relatively light burden which the railroad must bear' in establishing exclusive arbitral jurisdiction under the RLA." 491 U.S. at 306-07 (citations omitted).

627, 635 (4th Cir. 1997) (reversing district court decision finding a dispute to be "major" under the RLA because of "unambiguous" contract language because the court had failed to consider past practice, implied and express terms of related agreements, the bargaining history of the agreements, and other extrinsic evidence). There is no basis, therefore, for suggesting that the decision of the Seventh Circuit is "in conflict" with the *Conrail* decision or any other decisions.

II. THE DECISION BELOW TURNED UPON APPLICATION OF ACCEPTED PRINCIPLES TO THE FACTS OF THIS PARTICULAR CASE AND ACCORDINGLY DOES NOT PRESENT ANY IMPORTANT ISSUE OF FEDERAL LAW WARRANTING REVIEW BY THIS COURT

BMWE asserts that the decision of the Seventh Circuit is fundamentally at odds with the "purpose and structure" of the RLA because "[i]f the decision below is allowed to stand it would be virtually impossible for a union to show a unilateral change [in agreements] because even a departure from clear contract language would not be enough to establish a violation of Sections 2 Second and 6." (Pet. 15-16.) Thus, according to petitioner, "a mere assertion that extrinsic evidence suggests a possible latent ambiguity in facially plain language would be enough to defeat federal court jurisdiction to enforce those provisions." *Id.*

But the decision below bears no such extravagant construction. Rather, it is grounded in generally accepted legal principles as to which both the majority and the dissenting member were in accord, though they disagreed as to the application of those principles to the facts of this case. In particular they disagreed only about whether the specific language presented by Article XIV of the 1996 National

Agreement was so "absolutely unambiguous" as to bar the use of extrinsic evidence in interpretation.

The pivotal contractual term in this case is "employees." The Agreement prescribes that travel expenses are to be paid to "employees" who traveled specified distances. It does not define the term "employees," but rather leaves the term open-ended. (Pet. App. 6a, 40a.) No one contended below, however, that the term was intended to mean literally "all" employees. The union argues for one possible limitation ("traveling employees" without "fixed headquarters"), while the railroads argue for another (regional and system gangs).

Since there is no contractual language limiting the term "employees" to regional and system gangs -- nor, it might be added, to "traveling employees" without "fixed headquarters" -- the court below concluded that "if the act of interpretation were to stop at the four corners of the Agreement," the railroads' position could not be sustained. (Pet. App. 7a.) Moreover, the court acknowledged that, as a general matter, "extrinsic evidence cannot be used to override the 'express provisions of a written contract.'" (Pet. App. 8a-9a.) However, especially in light of the body of Supreme Court decisions establishing that collective bargaining contracts "fall into a different order of legal instrument from an ordinary contract" and "should [be] interpret[ed] . . . with a keen eye for the nuances of context," (Pet. App. 8a, 7a), the court looked to a limited and highly relevant part of the bargaining history -- the proceedings before the Presidential Emergency Board -- to determine whether a "latent ambiguity" may exist in the Agreement. (Pet. App. 9a.)

The court was sensitive to the "danger in opening the door too wide to extrinsic evidence" but concluded that such a "danger is not present here." (Pet. App. 10a.) Rather, it concluded that the "hearings and report of the Presidential Emergency Board 229 . . . is a particularly apposite slice [of the

bargaining history] for our purposes." *Id.* That was so "because the negotiators took a chunk of PEB 229's report and inserted it word-for-word in the Agreement" as the very provision in dispute here. In sum, the court had "a manageable and definable set of documents, collected from an official hearing, from which the parties drew the language at issue in this case." *Id.*

Examining this limited aspect of the bargaining history, the majority "readily agree[d]" with the railroads' claim that it was "proof positive that when the PEB drafted the future Article XIV, the Board thought that the union's overarching concern was regional and system gangs." (Pet. App. 11a.) It noted:

> "When PEB 229 pronounced its understanding of the union's general contentions, it explicitly linked the issue of travel allowances to regional and system gangs, not all traveling employees. . . . The PEB also explained the union's specific proposal on travel allowances in terms of regional and system gangs. . . . In several instances the union itself straightforwardly framed the issue of travel allowances around the regional and system gangs." (Pet. App. 11a-12a.)

The "starkest example," the court observed, was the testimony referred to above in which BMWE's witness on the travel allowance issue told the Board that the union's "fundamental proposal" --"what we are after" -- with respect to travel allowances was a remedy for uncompensated travel time and expenses of members of "the carriers' most productive gangs, its regional and system gangs." (Pet. App. 12a-13a.) This focus upon regional and system gangs was to be expected, because, as the court noted in tracing the history of this dispute, "the issue of regional and system gangs" had held "the limelight" in railroad

labor strife since Congress imposed the previous national agreement on the parties in 1991. (Pet. App. 5a.)

In these circumstances, the majority below concluded that "a latent ambiguity may exist in the Agreement, namely that the PEB meant only to refer to regional and system gangs," and that accordingly the railroad's position was "'arguably justifiable' and not 'frivolous'" within the meaning of the *Conrail* rule. (Pet. App. 13a-14a.) The majority ruled that the dispute should be arbitrated, rather than be resolved in litigation in federal court or through a nation-wide railroad strike.[9]

The dissenter below, while noting that "there is much in the majority's opinion with which [she was] in full agreement," nevertheless "disagree[d] with its ultimate conclusion." (Pet. App. 14a.) (Wood, J., dissenting). But she did so not because of a disagreement over fundamental principles of RLA jurisprudence or contractual interpretation, but rather over the application of these principles governing admissibility of extrinsic evidence to the unusual contract language in this particular case.

The dissent relied primarily on the principle that "extrinsic evidence may [not] be used to contradict explicit terms of a collective bargaining agreement" when the "plain language" of the agreement is "unambiguous." (Pet. App. 17a.) But, as we have noted, the majority also emphasized this same principle in its own analysis of the relevant legal rules. (Pet. App. 9a.) In short, the majority and the dissent agreed on the basic rule.

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[9] This result is consistent with prior decisions by this Court that emphasize 1) the legislative desire to keep these railway labor disputes out of the court system and 2) the need to have these disputes resolved by expert arbitrators who are versed in the "intricate and technical" problems of the railroad industry. *See, e.g., Order of Conductors* v. *Pitney*, 326 U.S. 561, 567 (1946).

The difference between the majority and the dissent was simply that they disagreed about how clear this particular contract language was. Unlike the dissent, the majority did not view the contractual provision involved here as "absolutely unambiguous and complete," since the term "employees" is not expressly defined. Thus, the majority below did not believe that the limitation of the term "employees" to a particular type would "contradict" explicit terms, as it would have if the term were defined in the bargaining agreement to extend to other types of employees. That is, had the contract defined "employees" as "all traveling employees" without "fixed headquarters," extrinsic evidence presumably could not be employed to restrict that term to "regional and system gangs." But the Agreement leaves the term open-ended. (Pet. App. 6a.) In these circumstances, the majority invoked the "latent ambiguity" rule expressed in *FDIC* v. *W.R. Grace & Co.*, 877 F.2d 614 (7th Cir. 1989), and looked to an especially reliable body of extrinsic evidence to ascertain whether the parties intended that a term unlimited on its face was to have a more limited meaning:

> "So parol and other extrinsic evidence is admissible . . . to demonstrate that the contract is ambiguous. Admissible, that is to say, even if the contract has no intrinsic ambiguity -- even if it would seem perfectly clear to a normal reader of English, although to persons knowledgeable about the circumstances in which the contract had been intended to apply the 'normal' reading might be nonsense. That is what it means to say that extrinsic evidence is admissible to *demonstrate* an ambiguity. There is no ambiguity on the surface of the document; the ambiguity appears only when extrinsic evidence is considered" *Id.* at 620-21 (citations omitted; emphasis in original.)

In short, the only question that would be presented for review by this Court would be whether the language in this particular collective bargaining agreement, in the circumstances of this particular case, is so "explicit," so "absolutely unambiguous and complete," that no extrinsic evidence, however compelling, may be considered to determine whether the railroads' interpretation is "frivolous." A decision on that question, even if contrary to the decision below, would be of no abiding importance, but good for this case only. And so far as this case is concerned, the union will have ample opportunity to persuade an arbitrator of the correctness of its view of the meaning of the Agreement; the arbitrator will be able to provide relief if the union's position is sustained. *Conrail*, 491 U.S. at 310 n.8.

* * * *

In sum, the decision below is in harmony with the principles uniformly applied concerning the interpretation of collective bargaining contracts and the determination of the question whether a dispute is major or minor under the RLA. There is no substance to the union's effort to convert a simple difference of opinion between the majority and the dissent respecting the clarity of the unique language in this particular contract into a major issue of federal law, much less a conflict with this Court's decision in *Conrail*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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